STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 14, 2005
v	No. 253224 Kent Circuit Court
DEMARIOL DONTAYE BOYKIN Defendant-Appellant.	LC No. 03-004460-FC

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant appeals by right his convictions for first-degree murder, MCL 750.316(1)(c), and possession of a firearm during the commission of a felony, MCL 750.227b. He contends there was insufficient evidence of premeditation and deliberation to support his conviction for first-degree murder. We review a challenge to the sufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We affirm.

A conviction of first-degree murder requires that the prosecution prove the following elements beyond a reasonable doubt: (1) that defendant caused the death of the victim, (2) that defendant intended to kill the victim, (3) that the intent was premeditated, (4) that the killing was deliberate, (5) that the killing was neither justified nor excused. CJI2d 16.1; see also *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. * * * [P]remeditation and deliberation characterize a thought process undisturbed by hot blood." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998), quoting *People v Morrin*, 31 Mich App 301, 329-330; 187 NW2d 434 (1971). "Some time span between initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation." *People v Hoffmeister*, 394 Mich 155, 161; 229 NW2d 305 (1975).

The prosecution presented sufficient evidence of premeditation and deliberation. First, defendant's thought processes were undisturbed by hot blood. The victim, Shawn Broyles, and defendant's brother Marvin were engaged in a fist-fight. Broyles' two friends were present, but did not think the fight was serious enough to merit their involvement. Defendant, his father, and defendant's brother Charles were present. Neither defendant's father nor Charles thought the fight was serious enough to merit their intervention either. At no time did Broyles attack or threaten to attack defendant. In fact, Broyles had already begun running from the scene of the altercation when defendant started shooting at him.

Second, defendant had time in which to consider his actions. Broyles pleaded with defendant to "Come on, stop," presumably after he saw the gun in defendant's hand. Defendant, however, did not stop. Broyles turned and ran from defendant. Defendant raised his gun and fired three to four shots at Broyles. Broyles fell after being shot twice. One witness testified that defendant lifted Broyles up by his jacket hood, put the gun to his cheek, and pulled the trigger, but the gun did not fire. The gun, found by Broyles' cousin, was determined to be jammed. After attempting to shoot Broyles again, defendant and his two brothers kicked Broyles as he lay dying on the sidewalk. Defendant's brother Marvin testified that defendant said he shot Broyles because Broyles had jumped him a few years before.

This case closely resembles *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979), in which our Supreme Court affirmed the defendant's conviction of first-degree murder. The Court stated that for premeditation and deliberation to be found during "a sudden affray" the fact-finder must determine (1) that the killing did not stem from "sudden impulse" and (2) that there had been time enough for the defendant to give his actions a "second look." *Id*. at 44-45.

As evidence that the killing did not stem from sudden impulse the Court found two facts significant: (1) the fighting had ended before Tilley shot the decedent, and (2) Tilley shot the decedent after he began retreating. *Id*. at 45. Likewise, in the present case, defendant shot Broyles after the fight between Marvin and Broyles ended, and defendant shot Broyles after he began retreating. As evidence that the defendant had the opportunity to give his actions a second look, the *Tilley* Court noted that (1) there was an interval between Tilley securing possession of the gun and the first volley of shots as the decedent was retreating, (2) Tilley followed the decedent after the first volley of shots as the decedent continued retreating creating a time-lapse between the first and second volley of shots, and (3) after following the decedent through the doorway of the restaurant Tilley had to raise the gun before firing the second volley of shots. *Id*. at 45. The Court found that these intervals of time were sufficiently long to permit Tilley to reflect upon his actions. *Id*. at 45-46. Likewise, in this case, defendant had time to reflect upon his actions as he sat in the vehicle with the gun inside his coat watching the altercation. Defendant had time to reflect upon his actions when Broyles yelled out, "Come on, stop." Defendant had time to take a second look when Broyles ran from him, and defendant had time to take a second look while he was chasing defendant down the street.

In light of the foregoing, the prosecution presented more than sufficient evidence of premeditation and deliberation to support defendant's first-degree murder conviction beyond a reasonable doubt.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio